Supreme Court, U.S.
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No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1997

ANDREW LEO LOPEZ,

Petitioner,

vs.

MARK SHAPIRO, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S PETITION FOR *WRIT OF CERTIORARI*

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23 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether functional approach for judicial immunity includes:

a.) Undisputed failure of metropolitan judge to personally serve as required by this Court, other reviewing courts, and by forum state [New Mexico] notice of criminal contempt of court;

b.) Undisputed wrongful issuance of arrest warrant by metro court clerks;

c.) Undisputed arrest by sheriff's deputy long after facial order was publicly countermanded;

d.) Upon appeal, undisputed tampering with evidence by metro judge who convicted petitioner of contempt of his court;

e.) During appellate hearing of contempt conviction judge and clerks asked for witness fees which state at later hearing conceded were not due parties to a case;

f.) After successful appeal by petitioner, it is undisputed that metro judge destroyed case file in state that allows civil recovery for destruction of evidence.

2.) Whether appellate panel improperly used rules of procedure to avoid discipline of panel pleaded by petitioner in motion for rehearing *en banc*.

PARTIES TO THE PROCEEDINGS BELOW

Appellees and Respondents in Lopez v. Shapiro *et. al.* are Mark Shapiro, Evelyn L. Jaramillo, Lucia Andrianna Ramirez, Bernalillo County Sheriff, and John Doe, Sheriff's Deputy.

There are no corporate parents or subsidiaries which are parties to this action.

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OPINIONS BELOW

The unpublished opinion and judgment of the United States Court of Appeals for the Tenth Circuit in Lopez v. Shapiro *et al.* is set forth in Appendix A hereto and its denial of Petitioner's Motion for Rehearing *En Banc* is set forth in Appendix B.

JURISDICTION

The Tenth Circuit entered its order and judgment on February 19, 1998 and its denial of Petitioner's Motion to Rehear *En Banc* on March 24, 1998. This Court granted [A-826] Petitioner's application for an extension of time within which to file his petition for a *Writ of Certiorari* to and including July 19, 1998.

Because this Petition comes timely, this Court's jurisdiction is properly invoked pursuant to: 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall ... be deprived of life,

liberty, or property, without due process of law...."

STATEMENT OF THE CASE

Two clerks of a metropolitan judge in Albuquerque, New Mexico took umbrage at alleged offensive acts committed by Petitioner and wrongfully procured a warrant for his arrest by preparing paperwork for the judge to sign an arrest warrant for contempt of court for alleged failure to appear on a traffic citation for overtime parking. Undisputed is that warrant for criminal contempt never was personally served upon Petitioner. By pure coincidence Petitioner appeared before same judge almost two years later to contest another parking ticket [Petitioner, a CPA, discovered that City of Albuquerque had installed parking meters around his office and wilfully failed to fix a large number of defective meters that were overcharging for parking]. Petitioner pled and won his case and upon leaving court was arrested by Sheriff's deputy who had been surreptitiously called by clerks. Petitioner insisted upon seeing case file with charges underlying arrest and learned that sole charge was a misdemeanor for contempt of court for failure to appear.

Whereupon Petitioner bluntly informed Sheriff's deputy that he had been duped by clerks to arrest for a misdemeanor warrant that had been publicly countermanded in publications and news media of wide circulation in order to relieve serious overcrowding of city/county jail. Petitioner, thus forced deputy to comply with public order and ignore facially valid order. Petitioner posted bond and set hearing for contempt warrant. Petitioner pled before judge who set fine at nominal/$5.00 or well below minimum which was suspended if no violation in ninety days, but outrageously convicted a practicing CPA of contempt of court for allegedly failing to appear. Petitioner appeared at cattle call hearing for underlying parking violation, but clerks who knew that he could only stay for an hour due to a previous engagement refused to call his case. Petitioner, as is routine in such cases, had previously explained to the clerks that he had to leave and asked for grant of routine courtesy of expediting his case. Clerks at time of request readily agreed to call Petitioner's case quickly in order to speed him on his way. For reasons that remain a mystery to this day, the clerks

resented that Petitioner on the day and time of hearing reminded them of his request to expedite his case. Clerks on witness stand at later appellate hearing claimed that Petitioner was rude and abrasive toward them and that his alleged pacing [physically impossible due to crowded courtroom] irritated them. Thus, they delayed call of his case which forced Petitioner to leave after almost an hour. Upon his departure clerk called Petitioner's case and of course he was gone. During successful appellate hearing metro judge admitted that nothing of Petitioner's behavior had come to his attention in his court and that the first time that he was aware of the contempt was when Petitioner appeared to contest the contempt warrant. Apparently getting along with his clerks was more important than justice. Outrageously the good metro judge, who has since resigned, left New Mexico and left behind one of the most lucrative pension programs in the nation, convicted Petitioner of contempt of court which, if upheld on appeal, would have professionally ruined Petitioner. His licenses to practice in California, New Mexico and Texas would have been revoked or suspended for his

conviction.

Petitioner filed suit in U.S. District Court for the District of New Mexico and his suit was dismissed for failure to state a claim because all acts complained of were immune.

The Tenth Circuit upheld the district court on the grounds of immunity and Petitioner now petitions this Court for a *Writ of Certiorari* to the Tenth Circuit.

REASONS FOR GRANTING THE *WRIT*

1. THE JURISDICTION OF THIS COURT IS PROPERLY INVOKED.

This petition with due regard to the extension granted by this Court comes on for consideration timely pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

2. DECISION BELOW CONFLICTS WITH THOSE OF OTHER COURTS OF APPEAL ON THE SAME ISSUE(S).

"Supreme Court will grant *certiorari* to resolve conflict of decisions of federal courts in different circuits...." *Baker*, 417 U.S. 467 (1974).

Metro judge and clerks acting as witnesses in their own defense on appeal groundlessly pled for witness fees after appellate court overturned contempt conviction. Malicious prosecution and abuse of process to prosecute a groundless claim for fees are not judicial activities. "Judicial immunity does not protect from non-judicial activities," *Lynch v. Johnson*, 420 F.2d 818, 820 (6th Cir. 1970), and "what is or is not a judicial act is not wholly free from doubt." *Crowe v. Lucas*, 595 F.2d 985, 990 (5th Cir. 1979).

Further, conspiracies first between clerks then extended to include Sheriff's deputy and then the Metro judge himself to deprive a person of his constitutional rights are cognizable claims. See *Mizell v. North Broward Hospital District*, 427 F.2d 468, 472-473 (5th Cir. 1970).

"A state official is not absolutely immune from damages [deputy arresting petitioner] arising from the execution of an order issued by a judge acting in the clear absence of all jurisdiction," *Tunney v. O'Toole*, 898 F.2d, 1470, 1474 (10th Cir. 1990) (citations omitted) and quasi-judicial immunity will not

attach to state official's action "outside scope of their jurisdiction." ***Id.*** (quoting *Cok v. Cosentino*, 876, F.2d 1, 3 (1st Cir. 1989) [Deputy arresting on say so of clerk where facially proper order had been countermanded]. There are limits on immunity from an unlawful order. See ***Tunney*** at 474.

Finally, forum state permits civil recovery for tampering or destruction of evidence. Undisputed is that metro judge tampered with evidence before Petitioner's successful appeal and destroyed file after. Tampering and destruction are not immunizable as judicial acts even when committed by a judge.

3. DECISION BELOW CONFLICTS WITH THOSE OF THIS COURT ON THE SAME ISSUE(S).

The Supreme Court has never undertaken to articulate a precise and general definition of the class of acts entitled to immunity, See *Forrester v. White*, 484 U.S. 219, 227 (1988) and immunity is justified and defined by the *functions* [sic] it protects and serves, not by the person to whom it attaches. ***Id.***

"When a contempt takes place [as here allegedly] outside presence of court, the contemnor must be given notice before

punishment may be imposed," *Cooke v. United States*, 267 U.S. 517 (1925) and "the court would have no jurisdiction and no power to punish without the initiation of the proper proceeding," *State v. Armijo*, 38 N.M. 280, 31 P.2d 703 (1934), where "notice of criminal contempt may be properly given only by personal service [never done] of the bench warrant to be effective," *Lindsey v. Martinez*, 90 N.M. 737, 568 P.2d (Ct. App. 1977) and "appearance to object to lack of service even if content of service is known to defendant does not constitute waiver of service or acceptance of the court's jurisdiction and the [metro] court had no jurisdiction over the defendant." *Roybal v. Martinez*, 92 N.M. 630, 632, 33, 553 P.2d 71 (Ct. App. 1979) (citations omitted).

"When want of jurisdiction is known to the judge [as here] no excuse is permissible," *Stump v. Sparkman*, 435 U.S. 356 at N6 (1978) and there is "no immunity for actions that are judicial but without jurisdiction." *Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993); See also ***Stump*** at 349.

Moreover, procedural errors mentioned in ***Stump*** at 359

cannot include mandatory service of notice. Otherwise any sitting judge could issue warrants for criminal contempt against anyone and have them arrested without even notice or the opportunity to defend.

Finally, Tenth Circuit denied motion to rehear *en banc* on grounds that motion was untimely. Nonsense, panel denied motion on timeliness to avoid discipline for egregiously improper ruling against a *pro se* appellant in a civil case where motion prayed for discipline of panel.

When Petitioner moved for rehearing on timeliness, Court ruled that only one motion for rehearing per case was allowed.

Thus, did panel avoid discipline and hearing by full court of appeals.

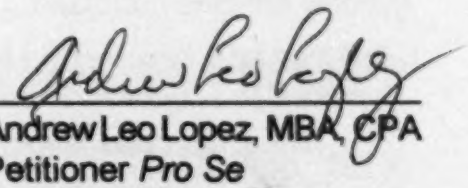
CONCLUSION

The United States Court of Appeals for the Tenth Circuit misconstrued facts, misapplied case law, decided contrary to case law from its own court, decided contrary to decisions from other circuits on the same facts and issues, decided contrary to the case law of this Court on the same facts and issues and

acted such that this Court in its supervisory capacity must grant this petition for *writ of certiorari* to overturn a decision so contrary to settled law that it fuels rising disrespect for the court system.

Wherefore, Petitioner respectfully prays this Court for a *Writ of Certiorari* to the United States Court of Appeals for the Tenth Circuit and such other and further relief as the Court may find just in these premises.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ANDREW LEO LOPEZ, individually and dba Andrew Leo Lopez, CPA,	)	
Plaintiff-Appellant,	)	
v.	)	No. 97-2334
	)	(District of New
MARK SHAPIRO, EVELYN L. JARAMILLO, LUCIA ADRIANNA RAMIREZ, BERNALILLO COUNTY SHERIFF, and JOHN DOE, Sheriff's Deputy,	)	Mexico) (D.C. No. CV-96-1757-LH/DJS)
Defendants-Appellees.	)	

ORDER AND JUDGMENT*

Before **BALDOCK, EBEL**, and **MURPHY**, Circuit Judges.

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The court therefore honors the parties' requests and orders the cause submitted without oral argument.

Andrew L. Lopez, proceeding *pro se*, appeals the district court's dismissal pursuant to Fed. R. Civ. P. 12(b)(6) of his 42 U.S.C. §§1983 and 1986 civil rights complaint. Lopez brought suit against Judge Mark Shapiro, a New Mexico metropolitan court judge, Evelyn Jarmillo [sic], Judge Shapiro's secretary, Lucia Ramirez, Judge Shapiro's "court secretary," and the Bernalillo County Sheriff's Office and sheriff's deputy John Doe. Lopez alleged the Judge Shapiro violated his civil rights when he held him in contempt of court for failing to appear at a hearing on a parking violation.[1] He further alleged that Jarmillo and Ramirez violated his civil rights by participating in the

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[1]Lopez's contempt conviction was eventually overturned on appeal.

issuance of a bench warrant for Lopez's arrest for failure to appear. Finally, Lopez asserted that the sheriff's office and deputy John Doe violated his rights when deputy Doe arrested him on the bench warrant. The defendants filed a motion to dismiss based on absolute judicial immunity. After a hearing on the matter, the district court agreed that the defendants were immune and dismissed the suit.

This court has conducted a *de novo* review of Lopez's complaint and agrees with the district court's conclusion that the complaint fails to state a claim. Taking all of the allegations set out in the complaint as true and construing them in the light most favorable to Lopez, each of the defendants is entitled to absolute judicial immunity. *See Mireles v. Waco*, 502 U.S. 9, 12 (1991) (per curiam) (holding judges are immune from suit for judicial acts unless those acts are "taken in complete absence of all jurisdiction"); *Stump v. Sparkman*, 435 U.S. 349, 356-59 (1978) (holding "the scope of a judge's jurisdiction must be construed broadly where the issue is the immunity of that judge" and that neither "commission of grave procedural errors" nor

acts "in excess of [the judge's] authority" will deprive the judge of immunity); *Russ v. Uppah*, 972 F.2d 300, 303 (10th Cir. 1992) (holding that "others performing judicial or 'quasi-judicial' functions enjoy absolute immunity"); *Newton v. Buckley*, No. 96-4202, 1997 WL 642085, at *4 (10th Cir. Oct. 17, 1997) (unpublished disposition) ("The circuits are in general agreement that a clerk's issuance of a warrant involves a quasi-judicial act and, therefore, carries with it the protections of absolute immunity."); *Valdez v. City & County of Denver*, 878 F.2d 1285, 1286 (10th Cir. 1989) (holding that police officers "charged with the duty of executing a facially valid court order enjoy[] absolute immunity from liability for damages in a suit challenging conduct prescribed in that order.").

The judgment of the United States District Court for the District of New Mexico is hereby **AFFIRMED**.

ENTERED FOR THE COURT:

Michael R. Murphy
Circuit Judge

EXHIBIT B

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ANDREW LEO LOPEZ, individually and dba Andrew Leo Lopez, CPA,	)	
Plaintiff - Appellant,	)	
v.	)	No. 97-2334
MARK SHAPIRO, EVELYN L. JARAMILLO, LUCIA ADRIANNA RAMIREZ, BERNALILLO COUNTY SHERIFF, and JOHN DOE, Sheriff's Deputy,	)	
Defendants - Appellees	)	

ORDER

Filed March 24, 1998

Before **BALDOCK, EBEL,** and **MURPHY**, Circuit Judges.

Appellant's petition for rehearing is denied as untimely by the panel that rendered the decision.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: [Audrey F. Weigel]
Deputy Clerk